U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

October 4, 2004 **FMLA2004-3-A**

Dear ***Name****,

Thank you for your letter regarding the substitution of paid leave for absences covered under the Family and Medical Leave Act of 1993 (FMLA). Specifically, you ask whether ***Name **** may offer enhanced sick leave benefits to employees beyond what the FMLA mandates, contingent upon the following: (1) ***Name **** receives additional information from the employee verifying the basis for the requested leave beyond that required under the FMLA, and (2) ***Name **** does not discriminate against individuals taking FMLA-qualified leaves versus other types of leaves in requesting such information.

Name * sick leave policy, ***Name ****, allows supervisors to require that employees who are absent because of illness provide "proof of illness" (by way of a doctor's note or otherwise) in order to receive paid sick leave. Proof of illness may be required from all employees under the plan, including those whose absences are covered under Section 102(a)(1)(D) of the FMLA and who have previously submitted medical certifications. You advise that the ***Name **** was in effect prior to the FMLA enactment and that similar ***Name **** exist for employees covered by collective bargaining agreements and for employees who are not covered under ***Name **** (including managers). You request an opinion from our office on whether ***Name **** complies with the FMLA.

The ***Name **** defines an "incidental absence" as the first seven consecutive calendar days or less that an employee is absent from work due to personal illness. As you have described the ***Name ****, proof of illness is not normally requested for the majority of employees subject to the plan. However, it is within the supervisor's right to request proof of illness from any employee if the supervisor has reason to believe that the employee may not be too sick to work or if the employee has a certain pattern or trend of absence which casts doubt upon the legitimacy of his/her claim to be too sick to work, such as a Monday/Friday absence pattern.

You advise that the ***Name **** are administered separately from FMLA leave policies and that it is possible for an absence to be paid under the ***Name **** and not approved as FMLA qualifying, and vice versa. You state that employees who take FMLA-qualifying leave for their own serious health conditions but fail to provide the proof of illness when requested receive unpaid, FMLA-protected leave but are not eligible for paid sick leave. Employees may substitute accrued personal or vacation leave for FMLA-qualifying absences without being required to provide proof of illness. You state that the ***Name **** specifically provides that "the fact that an employee has numerous FMLA-approved absences is not a reason to require proof of illness in order for the employee to receive paid sick leave for an incidental absence, without additional facts such as a Monday-Friday absence pattern, absence which coincides with a holiday, absence which coincides with overtime assignments, etc."

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job protected leave each year – with the maintenance of any group health insurance coverage – for specified family and medical reasons. Section 102(d) permits the substitution of certain paid leaves for the unpaid FMLA leave. Section 102(d)(2) provides that an employee may elect, or an employer may require, the employee to substitute certain accrued paid vacation leave, personal leave, family leave, or sick or medical leave for the unpaid leave provided under the Act. FMLA's legislative history indicates that the purpose of Section 102(d)(2) was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." (House Report 103-8, Feb. 2, 1993, p. 38.)

While the employer may not limit the substitution of accrued paid vacation or personal leave (see 29 C.F.R. 825.207(e)), the employer may limit the substitution of paid sick or medical leave to circumstances which meet the employer's usual requirements for the use of such paid leave (see Section 102(d)(2)(B) and 29 C.F.R. 825.207(c)). The regulations state that "an employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave 'in any situation' where the employer's uniform policy would not normally allow such paid leave." 29 C.F.R. 825.207(c).

If, as you represent, ***Name ** paid sick leave program is uniformly applied to absences caused by illness regardless of whether the absences are FMLA-qualifying, and if employees may take unpaid FMLA leave or substitute accrued vacation or personal leave should they choose not to provide the additional proof of illness required to receive paid sick leave, then the ***Name ** would comply with the FMLA.

Please note that in responding to your inquiry, we have assumed that all FMLA absences at issue are for FMLA-qualifying reasons. In your letter you raise the issue of seeking additional documentation pursuant to the ***Name ** for an employee you believed was potentially not "too sick to work" (the standard in your plan) but on FMLA-covered leave. We note that if an employer receives information that casts doubt upon the validity of the employee's stated reason for the FMLA-covered absence, the employer may request recertification. See 29 C.F.R. § 825.308; see also DOL Opinion Letter dated May 25, 2004 (finding that a pattern of Friday/Monday absences can constitute "information that casts doubt upon the employee's stated reason for the absence," and clarifying that employers can inform the health care provider of such an absence pattern as part of the recertification process.) Moreover, we note that FMLA protections do not apply where an employee fraudulently obtains FMLA leave. See 29 C.F.R. § 825.312(g).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*